

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ELVIR DELIJANIN, *individually and on behalf of*
others similarly situated,

Plaintiff,

18-CV-7854 (LJL) (KHP)

-against-

ORDER ON LATE OPT OUT

WOLFGANG'S STEAKHOUSE INC, *et al.*,

Defendants.

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KATHARINE H. PARKER, United States Magistrate Judge:

This Court previously addressed two untimely opt outs regarding the initial Notice sent to Class Members on July 23, 2020 following conditional approval of the class settlement and collective action by this Court. (Order, ECF No. 189.) This Court also provided the parties time to engage in supplemental Notice mailing to certain Class Members who did not receive the initial Notice, with a deadline for Class Members to respond by January 29, 2021. (*Id.*) The Plaintiff's have informed the Court that the settlement administrator did not receive any timely opt outs or objections, but did receive one untimely opt out by a Ms. Katherine Fletcher. Fletcher's opt-out form is dated January 29, 2021, the day of the deadline, and the opt-out mailing is post-marked February 4, 2021, six days after the deadline. She does not offer any excuse for the late mailing. Whether to excuse Fletcher's late notice and permit her to opt-out is an equitable decision made by the Court in its discretion taking into account all relevant circumstances surrounding the lateness. *Hanks v. Voya Ret. Ins. & Annuity Co.*, 16-cv-6399, 2020 WL 6538743 at *2 (S.D.N.Y. Nov. 6, 2020). The Court takes into consideration prejudice to

the opposing party, the length of delay, its impact on judicial proceedings, the reason for the delay, whether the delay was within the party's reasonable control and whether the party acted in good faith. *Id.* Here, while Fletcher did date her notice on the last day of the applicable opt-out period, as did Kujovic who's late opt out this Court accepted, the circumstances surrounding stresses on the United States Postal Service related to the COVID-19 pandemic, and this court took judicial notice of reports of widespread delays, those similar circumstances are not applicable to the time period in which the supplemental Notice was mailed to certain Class Members. Therefore, in the absence of explanation for the delay, and in light of the fact that the mailing was post-marked after the deadline, Fletcher's late opt-out will not be accepted, and she should receive a settlement check.

SO ORDERED.

DATED: New York, New York
February 11, 2021



KATHARINE H. PARKER
United States Magistrate Judge